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IN THE

# Supreme Court of the United States

No. 70-5025

FRANCIS HAINES,

*Petitioner,*

v.

OTTO J. KERNER, FORMER GOVERNOR, STATE OF ILLINOIS, et al.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR PETITIONER

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# TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| QUESTIONS PRESENTED | 3 |
| STATEMENT OF THE CASE | 3 |
| SUMMARY OF ARGUMENT | 6 |
| ARGUMENT: | |
| I. The Conditions of Solitary Confinement in the Illinois State Penitentiary, as Administered to a Partially Disabled Sexagenarian Prisoner Under the Circumstances of This Case Constituted Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments | 7 |
| II. Petitioner Was Unconstitutionally Deprived of Procedural Due Process of Law in the Prison Disciplinary Proceedings | 18 |
| CONCLUSION | 23 |


# TABLE OF AUTHORITIES

*Cases:*


| | |
|---|---|
| Barnes v. Hocker, No. R-2071 (D. Nev. Sept. 5, 1969) | 10 |
| Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969) | 12 |
| Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, ___ U.S. ___, 39 U.S.L. Week 4821 (June 21, 1971) | 9 |
| Blyden v. Hogan, 320 F. Supp. 513 (S.D. N.Y. 1970) | 21 |
| Boddie v. Connecticut, 401 U.S. 371 (1971) | 18 |
| Borden's Farm Products, Inc. v. Baldwin, 293 U.S. 194 (1934) | 13 |
| Bransted v. Schmidt, 324 F. Supp. 1232 (W.D. Wis. 1971) | 19 |

Page

Brooks v. Florida, 389 U.S. 413 (1967) . . . . . 8, 10, 17

Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971) . . . . . 14

Burns v. Swenson, 288 F. Supp. 4 (W.D. Mo. 1967) . . . . . 15

Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970) . . . . . 7

Carothers v. Follette, 314 F. Supp. 1014 (S.D. N.Y. 1970) . . . 15, 20

Clay (Ali) v. United States, ___ U.S. ___, 39 U.S.L. Week 4873 (June 28, 1971) . . . . . 23

Clutchette v. Procunier, No. C-70-2497 A.J.Z. (N.D. Cal. June 21, 1971) . . . . . 21, 22

Conley v. Gibson, 355 U.S. 41 (1957) . . . . . 13

Cooper v. Pate, 378 U.S. 546 (1964) . . . . . 9, 13

Counselman v. Hitchcock, 142 U.S. 547 (1892) . . . . . 21

Dearman v. Woodson, 429 F.2d 1288 (10th Cir. 1970) . . . . . 14

Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944) . . . . . 5

Dritsky v. McGinnis, 313 F. Supp. 1247 (N.D. N.Y. 1970) . . . 15

Escoe v. Zerbst, 295 U.S. 490 (1935) . . . . . 19

Gardner v. Broderick, 392 U.S. 273 (1968) . . . . . 21, 23

Garrity v. New Jersey, 385 U.S. 493 (1967) . . . . . 21

Giles v. Maryland, 386 U.S. 66 (1967) . . . . . 22

Goldberg v. Kelly, 397 U.S. 254 (1970) . . . . . 18, 23

Goolsby v. Gagnon, 322 F. Supp. 460 (E.D. Wis. 1971) . . . . . 19

Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970), cert. denied, 401 U.S. ___ (Apr. 26, 1971) . . . . . 19

Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) . . . . . 10, 14

Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969) . . . . . 10

Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark.), aff'd, ___ F.2d ___ (8th Cir. May 5, 1971) . . . . . 17

Houghton v. Shafer, 392 U.S. 639 (1968) . . . . . 9

Inmates of the Cook County Jail v. Tierney, No. 68 C-504 (N.D. Ill. Aug. 28, 1968) . . . . . 17

Inmates of the Maine State Prison v. Robbins, Civil No. 11-187 (D. Me., filed August 31, 1970) . . . . . 15

Page

In Re Korman, ___ F.2d ___, 9 Cr. L. Rptr. 2161 (7th Cir. May 20, 1971) . . . . . 21

In Re Kinoy, ___ F. Supp. ___, 8 Cr. L. Rptr. 2327 (S.D. N.Y. Jan. 29, 1971) . . . . . 21

In Re Medley, 134 U.S. 160 (1890) . . . . . 8

Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) . . . . . 13, 15

Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968) . . . . . 12

Johnson v. Avery, 393 U.S. 483 (1969) . . . . . 8, 14, 22

Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971) . . . . . 17

Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) . . . . . 10, 11

Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968) . . . . . 18

Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa.), aff'd, 436 F.2d 1255 (3rd Cir. 1971) . . . . . 10

Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970) . . . . . 11

Lee v. Washington, 390 U.S. 333 (1968) . . . . . 8

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) . . . 8

McGautha v. California, ___ U.S. ___, 39 U.S.L. Week 4529 (May 3, 1971) . . . . . 22

McNeese v. Board of Education, 373 U.S. 668 (1963) . . . . . 18

Mathis v. United States, 391 U.S. 1 (1967) . . . . . 21

Melson v. Sard, 402 F.2d 653 (D.C. Cir. 1968) . . . . . 21, 22

Mempa v. Rhay, 389 U.S. 128 (1967) . . . . . 19, 22

Miranda v. Arizona, 384 U.S. 436 (1966) . . . . . 21, 23

Monroe v. Pape, 365 U.S. 167 (1961) . . . . . 9, 18

Morris v. Travisono, 310 F. Supp. 857 (D. R.I. 1970) . . . . . 20, 22

Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970) . . . . . 19-20

People v. Dorado, 62 Cal. 2d 338, 398 F.2d 361, 42 Cal. Rptr. 169, cert. denied, 381 U.S. 937 (1965) . . . . . 21

People ex rel. Conn v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337 (1966) . . . . . 20

Piccirillo v. New York, 400 U.S. 548 (1971) . . . . . 21

Picking v. Penn. Ry. Co., 151 F.2d 240 (3rd Cir. 1945) . . . . . 5

Robinson v. California, 370 U.S. 660 (1962) . . . . . 8

Page

Rodriguez v. McGinnis, 307 F. Supp. 627 (N.D. N.Y. 1969), rev'd, ___ F.2d ___ (2d Cir. Mar. 16, 1971) ..... 15

Screws v. United States, 325 U.S. 91 (1945) ..... 17

Simmons v. United States, 390 U.S. 377 (1968) ..... 21

Sinclair v. Henderson, 435 F.2d 125 (5th Cir. 1971) ..... 12

Sostre v. Rockefeller, 312 F. Supp. 863 (S.D. N.Y.) ..... 15

Sostre v. McGinnis, ___ F.2d ___ (2d Cir. Feb. 24, 1971) 11, 14, 19

Spevak v. Klein, 385 U.S. 511 (1967) ..... 23

State ex rel. Johnson v. Cady, 185 N.W.2d 306 (Wis. 1971) ... 19

Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965) ..... 15

Trop v. Dulles, 356 U.S. 86 (1958) ..... 9

Uniformed Sanitation Men's Association v. Commissioner, 392 U.S. 280 (1968) ..... 23

United States v. Jones, 207 F.2d 185 (5th Cir. 1953) ..... 17

United States v. Wade, 388 U.S. 218 (1967) ..... 22

United States ex rel. Campbell v. Pate, 401 F.2d 55 (7th Cir. 1968) ..... 18

United States ex rel. Hancock v. Pate, 223 F. Supp. 202 (N.D. Ill. 1963) ..... 14, 20

Washington v. Texas, 388 U.S. 14 (1967) ..... 22

Weems v. United States, 217 U.S. 349 (1910) ..... 9, 14

Wilkerson v. Utah, 99 U.S. 130 (1878) ..... 9

Williams v. Illinois, 399 U.S. 235 (1970) ..... 13

Wright v. McMann, 321 F. Supp. 127 (N.D. N.Y. 1970) ..... 13

Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) ..... 10, 15

*Statutes:*

28 U.S.C. § 1254(1) ..... 2

42 U.S.C. § 1983 ..... 2, 9

Ill. Rev. Stat. ch. 38 § 7-1 ..... 20

Ill. Rev. Stat. ch. 38 § 7-13 ..... 20

Ill. Rev. Stat. ch. 38 § 12-1 ..... 20

Ill. Rev. Stat. ch. 38 § 12-3 ..... 20

Page

Ill. Rev. Stat. ch. 81 § 37 (repealed) . . . . . 13

Ill. Rev. Stat. ch. 108 § 118 . . . . . 20

Maine Rev. Stat. P.L. 1971 Chapter 397 (June 4, 1971), Amending Title 34, § 709 . . . . . 16

*Regulations:*

Federal Bureau of Prisons, Policy Statement 2001.1 (Feb. 19, 1968) . . . . . 21

Federal Bureau of Prisons, Policy Statement 7400.5, app. A (Nov. 28, 1966) . . . . . 16

Federal Bureau of Prisons, Policy Statement 7400.6 (Dec. 1, 1966) . . . . . 20

Missouri State Penitentiary Rules and Procedures, Personnel Information Pamphlet . . . . . 15, 20

New York Department of Correctional Services, Regulations for Special Housing Units (effective Oct. 19, 1970) . . . . . 15

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American Law Institute, Model Penal Code, Article 304.7(2) (proposed official draft 1962) . . . . . 20

2A MOORE, Federal Practice ¶ 12.08 (2d ed. 1968) . . . . . 13

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Opinion of New York Attorney General, 8 Cr. L. Rptr. 2486 (Feb. 11, 1971) . . . . . 21

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections (1967) . . . 7

Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 Stan. L. Rev. 473 (Feb. 1971) . . . . . 17

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR PETITIONER

## OPINIONS BELOW

The opinion of the Court of Appeals affirming the dismissal of petitioner's civil action is reported at 427 F.2d 71 (1970), and is printed in the Appendix at pp. 65-66. The opinion of the United States District Court for the Eastern District of Illinois is not reported, and is set forth in the Appendix at pp. 58-60.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1970, and a timely petition for rehearing, with suggestion that it be heard en banc, was denied on June 19, 1970. The petition for writ of certiorari was filed on September 17, 1970, and was granted on March 8, 1971. 401 U.S. 954. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, . . ."

The Sixth Amendment provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides, in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

This case also involves 42 U.S.C. § 1983 providing a right of relief in damages and in equity for violations of constitutional rights.

## QUESTIONS PRESENTED

1. Did the District Court err in dismissing, without requiring an answer or holding a hearing, a complaint filed by a state prisoner, pro se, against prison officials, which raised grave constitutional questions concerning alleged mistreatment?

2. Did the conditions of solitary confinement in the Illinois State Penitentiary, as administered to a partially disabled, sexagenarian prisoner under the circumstances of this case, constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

3. Was petitioner unconstitutionally deprived of fundamental procedural safeguards in the prison disciplinary proceedings?

## STATEMENT OF THE CASE

Taking as true the allegations of the complaint, as they must be on a motion to dismiss, the facts are as follows:

Francis Haines, petitioner, has been since 1939, and still is, an inmate of the Illinois State Penitentiary, Menard Branch, serving a life sentence for burglary.

On March 10, 1968, Haines, who was then 66 years old and 30% permanently disabled,[1] and two other inmates, Moore and Doherty, who were then approximately 30 years of age, were assigned to the Inside Yard Gang. One of the defendants herein, Paul T. Duncan, was the officer in charge of that work detail. (A. 14)

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[1]The disability was due to the following foot injuries: Left foot—2nd, 3rd and 4th Cuboid Bones and 3rd Metatarsal fractured, which resulted in an Ankylosis in the Cuboid Bones. Rights foot—vertical fractures in the heel bones, discernable only by an X-ray in a specific position of the foot. Haines added that he had been awarded compensation in a hearing before the Illinois Industrial Commission for these injuries. (App. 14).

Haines and the two younger inmates engaged in an argument in which it seemed to Haines that Moore was urging and inciting Doherty against Haines. Several times it was said by both Moore and Doherty that the "Young Blood" was taking over and that the "Old Blood" like Haines was "done". After this argument had proceeded for a time, Haines returned to work and obtained a shovel for loading cinders on a truck. He banged the shovel on the concrete outside the Yard Gang Shack, in order to dislodge a clod of dirt. (A. 14)

When he entered the shack, Doherty and Moore resumed the argument, during which time Moore was very emphatic that the "Young Blood" such as he were taking over and that Haines had better watch out or he would be hurt. (A. 15)

A little later, Haines entered the bathroom and the other two inmates approached him in a threatening manner and resumed the argument. Following a provocative comment from Doherty, Haines hit him with the shovel, inflicting cuts on his head. Moore and Haines then scuffled briefly. After Officer Duncan took Doherty into the back room to attend his injuries, Moore kept making dire and foreboding threats to Haines to the consequences of his acts. Inmate Orlando, No. 34527, witnessed these events subsequent to Haines' hitting the shovel on the concrete. (A. 15)

Subsequently, Officer Rogers, another defendant herein, took Haines to what is known in the institutional vernacular as the "hole" or solitary confinement, which in recent years the officials call isolation. (A. 15)

Rogers took Haines before Officer Russell Lence, another defendant herein, who was disciplinary officer that day. Haines refused to explain his actions other than to say that he had hit Doherty with the shovel. He was locked in an isolation cell until a report could be had from Duncan. (A. 15-16)

When this report was obtained, Lence and Rogers called Haines before them again and read the report to him. Haines

objected to statements of Duncan that he had hit the shovel on the Yard Gang Shack floor, and refused to discuss the statement of Duncan that he had engaged with the other two men. Lence wanted to know why Haines would hit Doherty and stated that it had been twenty-eight years since Haines had been in the "hole." When Haines refused to talk to these officers he was given fifteen days punishment in isolation, from March 10 to March 25, 1968. (A. 16)

This isolation, "hole," or solitary confinement consisted of dark cells, and the only difference Haines could see in the intervening twenty-eight years between his trips to it were as follows: he was given three (3) blankets instead of two to sleep on a concrete floor; there had been a toilet installed instead of toilet buckets formerly used; he received (2) slices of bread every morning and evening, along with a noon meal, instead of the four (4) slices of bread formerly received. No articles of hygiene were furnished to him, and his false teeth became so rancid he had to leave them out. No towel or soap was furnished.[2]

Following his stay in isolation, Haines was demoted, without any hearing, to "C" grade under the institution's "Progressive Merit System," which entailed the loss of certain unspecified "privileges," including Commissary. (A. 16, 17) HIs chances of obtaining release on parole may also have been adversely affected.

As a result of his confinement in the "hole," Haines suffered great physical anguish and pain to his feet and circulatory trouble in his legs, due to being forced to sleep on the concrete floor. (A. 18)

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[2]Given the liberal construction due this *pro se* complaint, Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944); Picking v. Penn. Ry. Co., 151 F.2d 240, 244 (3rd Cir. 1945), it may be fair to infer, that Haines was also deprived of contact with the outside, recreation, reading, writing, showers, and periodic examinations by a member of the medical staff.

On July 1, 1968, Haines filed a complaint in the United States District Court for the Eastern District of Illinois, seeking damages, declaratory judgment and such other and further relief as justice and equity may require, against officers Duncan, Russell Lence, Rogers, and Sheets (the commissary officer), the members of the Progressive Merit System of the Illinois State Penitentiary at Menard, the Director of the Illinois Department of Public Safety, who allegedly made the rules and regulations pertaining to the Illinois State Penitentiary, and the former Governor of the State of Illinois, who allegedly was superior to all of the other defendants, and could have cured all defects in their actions by executive order. (A. 7-19)

On defendants' motion to dismiss (A. 20-24), the District Court dismissed the action without any hearing (A. 58-60), and the Court of Appeals affirmed (A. 65-66), stating that–

> "State prison officials are vested with wide discretion, and discipline reasonably maintained in state prisons is not subject to our supervisory direction."

On March 8, 1971, this Court granted Haines' petition for a writ of certiorari.

## SUMMARY OF ARGUMENT

### I.

When prison officials violate the paramount federal constitutional right of prisoners not to be treated like animals, without justification, the federal courts may not abdicate their remedial jurisdiction, clearly conferred by Congress, on the ground that "discipline reasonably maintained in State prisons is not subject to our supervisory direction." The *pro se* complaint in this case sufficiently stated a claim of "excessive" or "unnecessary cruelty" constituting unconstitutional "cruel and unusual punishment," so as to preclude summary dismissal by the District Court without requiring an answer from defendants or holding an evidentiary hearing, if necessary.

II.

Among the fundamental rights retained by prisoners are their privilege against compelled self-incrimination and their right to assistance of counsel. Without adequate protection of these rights in a prison disciplinary proceeding where the misconduct alleged also constitutes a prosecutable offense, prisoners are effectively denied their rights, guaranteed by Due Process, to a meaningful opportunity to explain away the accusation. In this case, plaintiff was precluded from presenting a substantial claim of self-defense, as either a complete defense or in mitigation of punishment.

## ARGUMENT

### I.

### THE CONDITIONS OF SOLITARY CONFINEMENT IN THE ILLINOIS STATE PENITENTIARY, AS ADMINISTERED TO A PARTIALLY DISABLED, SEXAGENARIAN PRISONER UNDER THE CIRCUMSTANCES OF THIS CASE, CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The broad power of a State to maintain discipline in its prisons is not here challenged, nor is the validity of the practice of solitary confinement, per se, drawn in question in the instant case.[3] Rather we raise, in Point I, only the narrow

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[3]See, e.g., Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970). Although solitary confinement has been described as one of "the main traditional disciplinary tools" of our prison systems, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 50-51 (1967), the Manual of Correctional Standards of the American Correctional Association contains a candid recognition by prison officials themselves that "[p]erhaps we have been too dependent on isolation or solitary confinement as the principal method of handling the violators of institutional rules. Isolation may bring short-term conformity for some, but brings increased disturbances and deeper grained hostility to more." Id., at 413. It has long been recognized that solitary confinement cannot

issue whether, absent a showing of justification for the specific incidents of confinement in this case, the totality of dehumanizing, degrading and debased circumstances imposed upon an elderly, partially disabled, prisoner for fifteen days, in a dark cell, with three blankets to sleep on a concrete floor, a toilet, but no towel or soap or any articles of personal hygiene, two slices of bread morning and evening, along with a noon meal, and where his false teeth became so rancid he had to leave them out, violated petitioner's paramount federal constitutional right to be free from cruel and unusual punishment.[4]

As this Court stated, in *Johnson v. Avery*, 393 U.S. 483, 486 (1969),

> "There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated."[5]

In *Brooks v. Florida*, 389 U.S. 413 (1967), this Court rejected, as involuntary, a state prisoner's confession to participating in a riot, which was obtained after he had been confined in a punishment cell for fourteen days under extremely onerous and disgusting conditions, which included

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be considered a mere custodial matter, and that it can cause mental illness, induce suicidal tendencies, and interfere with the possibility of rehabilitation. See, In Re Medley, 134 U.S. 160, 167-68 (1890).

[4]The command of the Eighth Amendment banning "cruel and unusual punishments" is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947); Robinson v. California, 370 U.S. 660 (1962).

[5]The Court there relied upon Lee v. Washington, 390 U.S. 333 (1968), in which the practice of racial segregation of prisoners was held invalid to the extent that it could not be justified by "the necessities of prison discipline and security." Id., at 334.

restricted diet, no bed or other furnishings, no external window, and lack of contact with the outside. The *per curiam* opinion observed: "The record in this case documents a shocking display of barbarism which should not escape the remedial action[6] of this Court." *Id.*, at 415.

This Court has said that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The guarantee is a flexible one, drawing its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Id.*, at 101. *Weems v. United States*, 217 U.S. 349, 373 (1910) "The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man." *Robinson v. California*, 370 U.S. 660, 668, 676 (1962) (Douglas, J. concurring). Although these notions may appear to be somewhat subjective, a more precise and judicially manageable standard was articulated long ago; "[I]t is safe to affirm that punishment of torture . . . and all others in the same line of *unnecessary cruelty*, are forbidden . . ." *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (emphasis supplied).

The lower federal courts, which have been presented with constitutional challenges to medieval dungeon-like conditions in some of the worst solitary confinement cells, have recognized the States' legitimate interest in maintaining prison discipline, but have not hesitated to strike down instances of hard core "inhuman treatment,"[7] which go far beyond the actual necessities of discipline and security.

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[6] "Remedial action," in the form of damages or equitable relief, has been explicitly authorized by Congress, in 42 U.S.C. § 1983, for deprivation of constitutional rights "under color of" state law. Cf. Monroe v. Pape, 365 U.S. 167 (1961); Cooper v. Pate, 378 U.S. 546 (1964); Houghton v. Shafer, 392 U.S. 639 (1968). See also, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, ___ U.S. ___, 39 U.S.L. Week 4821 (June 21, 1971).

[7] Trop v. Dulles, supra, at 100 n. 32.

See, *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967); *Knuckles v. Prasse*, 302 F.Supp. 1036, 1061-62 (E.D. Pa. 1969); aff'd, 436 F.2d 1255 (3rd Cir. 1971); *Hancock v. Avery*, 301 F. Supp. 786 (M.D. Tenn. 1969); *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969); *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Calif. 1966); *Barnes v. Hocker*, No. R-2071 (D. Nev. Sept. 5, 1969).[8]

In *Wright v. McMann, supra*, the Second Circuit reversed the dismissal, without a hearing, of a prisoners' complaint about unsanitary and degrading conditions in a solitary confinement cell in New York's Clinton Prison, and said:

> We are of the view that civilized standards of humane decency simply do not permit a man . . . to be deprived of the basic elements of hygiene such as soap and toilet paper. The subhuman conditions alleged by Wright to exist in the "strip cell" at Dannemora could only serve to destroy completely

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[8]There were some differences among the particular circumstances involved in the above cited cases. For example, *Hancock*, *Jordan* and *Knuckles* involved cells without light, while in *Holt*, *Wright* and *Barnes* the cells were lighted. In *Barnes*, the inmate slept on an iron bunk, while in *Jordan* he had a canvas mat, in *Knuckles* they had blankets on the floor. In *Brooks* the inmate was fed pea and carrot soup three times per day; in *Hancock* he was fed one regular meal and bread twice; in *Holt* he received a wholesome and sufficient but unappetizing diet; in *Barnes*, *Jordan* and *Wright*, they apparently received the regular institution diet. In *Brooks* and *Holt* the cells were overcrowded, while *Jordan* and *Hancock* involved true solitary confinement. In all the cases, the prisoners were deprived of the minimal comforts and institutional privileges that may make prison life tolerable for a flexible man. Significantly, none of the cases involved the imposition of such onerous conditions upon a partially disabled, elderly man, as here.

> the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treatment so foul, so inhuman and so violative of basic concepts of decency.[9]

The Court of Appeals did not rule out the possibility "that in exceptional circumstances it might be necessary to take from a prisoner all objects with which he could harm himself or others," but it observed, "apparently no determination was made that this *particular* prisoner was or would have become violent." That question of fact was left for resolution upon remand. 387 F.2d at 526 n. 15.

In *Jordan v. Fitzharris, supra,* the District Court declared that–

> "When . . . the responsible authorities in the use of the strip cells have abandoned elemental concepts of

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[9]The Second Circuit's recent en banc decision in Sostre v. McGinnis, ___ F.2d ___ (2d Cir. Feb. 24, 1971), is not to the contrary. In *Sostre,* the Court enumerated six factors raising the prisoner's confinement "several notches above those truly barbarous and inhumane conditions condemned elsewhere (*id.*, at ___). They were: (1) the prisoner's diet, which was the same (except for desserts) as in the general prison population; (2) the availability or rudimentary implements of personal hygiene; (3) the opportunity for exercise in the open air, compare, Krist v. Smith, 309 F. Supp. 497, 501 (S.D. Ga. 1970); (4) opportunity to participate in group therapy; (5) availability of reading matter from the prison library and unlimited numbers of law books; and (6) the constant possibility of communication with other prisoners. In addition, the Court pointed out that the prisoner always had adequate light for reading (*id.* at ___), full access to legal materials (*id.*) and a diet of 2800-3300 calories a day (*id.* at ___). Further, the Court noted the absence of any testimony that solitary threatened the mental or physical health of the inmate and found that a physician visited him every day (*id.* at ___, n. 24). Finally, the Court said that the prisoner aggravated his confinement by refusing to participate in group therapy (*id.* at ___). None of these factors explicitly relied upon by the Second Circuit is present in the instant case. In virtually every feature, Illinois-style solitary fails the test, particularly in view of petitioner's age and physical disabilities. As the Court in *Sostre* observed, in n. 23, "In some instances, depending upon the conditions of the segregation, and the mental and physical health of the inmate, five days or even one day might prove to be constitutionally intolerable."

> decency by permitting conditions to prevail of a shocking and debased nature, then the courts must intervene promptly . . . to restore the primal rules of a civilized community. . . ." *Id.*, at 680.

And, in *Sinclair v. Henderson*, 435 F.2d 125, 126 (5th Cir. 1971), the Fifth Circuit observed:

> "Although federal courts are reluctant to interfere with the internal operation and administration of prisons, we believe that the allegations appellant has made go beyond matters exclusively of prison discipline and administration; and that the court below should adjudicate the merits of the appellant's contentions of extreme maltreatment."

We recognize that some form of isolation of severely troublesome or violent prisoners is occasionally needed in order to maintain order, and we concede that prison officials have an area of administrative discretion in dealing with inmates who are in fact disruptive. However, as one Court of Appeals has said,

> "acceptance of the fact that incarceration, because of inherent administrative problems, may necessitate the withdrawal of many rights and privileges does not preclude recognition by the courts of a duty to protect the prisoner from unlawful and onerous treatment of a nature that, of itself, adds punitive measures to those legally meted out by the court." *Jackson v. Godwin*, 400 F.2d 529, 532 (5th Cir. 1968).

Thus, while prison officials are entitled to some administrative leeway, this "does not eliminate the need for reasons imperatively justifying the particular retraction of rights challenged at bar." *Barnett v. Rodgers*, 410 F.2d 995, 1000-1 (D.C. Cir. 1969).

The record in this case[10] is entirely barren of any indication by the State of Illinois that the unusually[11] cruel inhuman conditions imposed upon Haines, over and above the mere fact of isolation, were actually necessary for the preservation of order, or specifically, to contain this partic-

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[10]The District Court dismissed the *pro se* drafted complaint without requiring any answer from the defendants, either as to the truth of their alleged acts, or in justification therefor, and without giving Haines any hearing. However, as Professor Moore has stated the rule, "[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." 2A Moore, FEDERAL PRACTICE ¶ 12.08, at 2271-74 (2d ed. 1968). Accord, Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Moreover, "[I]t is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer." Borden's Farm Products Co., Inc. v. Baldwin, 293 U.S. 194, 213 (1934) (Stone & Cardozo JJ., concurring). See also, Cooper v. Pate, 378 U.S. 546 (1964). With the assistance of counsel, and the testimony of penological experts, e.g., Jackson v. Bishop, 404 F.2d 571, 575 (8th Cir. 1968), Haines, as well as the defendants, will have an opportunity, upon remand, to develop all of the facts fully on the record in the District Court. After the trial upon remand, in *Wright v. McMann*, supra, Judge Foley remarked that the record is "revealing and eye-opening . . . a portrayal of the real thing; it is prison life as it is . . . a facet of New York State prison discipline kept covered too long from the public view." 321 F. Supp. 127, 131, 132 (N.D. N.W. 1970).

[11]It is interesting to note that the relevant 1867 Illinois statute, quoted in the complaint (A. 12), which has since been repealed, specifically characterized, as "unusual punishment," "solitary confinement in a dark cell and deprivation of food except bread and water until such convict shall be reduced to submission and obedience" (former ch. 81, § 37). Of course, the antiquity of this barbaric practice does not insulate it from judicial scrutiny. As recently as 1970, this Court reiterated "[t]he need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution." Williams v. Illinois, 399 U.S. 235, 240 (1970). "[N]ew cases expose old infirmities which apathy or absence of challenge has permitted to stand." *Ibid.*, at 245.

ular prisoner, who had not been in the "hole" for the past *twenty-eight* years.

> "A punishment may be considered cruel and unusual when, although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim; that is, when a punishment is *unnecessarily cruel* in view of the purpose for which it is used." *Weems v. United States,* 217 U.S. 349, 370 (1910) (emphasis supplied); *Dearman v. Woodson,* 429 F.2d 1288, 1290 (10th Cir. 1970); *Hancock v. Avery,* 301 F. Supp. 786, 791 (M.D. Tenn. 1969); *Jordan v. Fitzharris,* 257 F. Supp. 674, 679 (N.D. Cal. 1966).[12]

There is neither allegation nor evidence that Illinois considers it essential or even useful to confine an elderly, partially disabled man alone in total darkness, to deprive him of rudimentary articles of personal hygiene, a bed, fresh air, exercise, and medical attention, and to severely restrict his diet. Indeed, practices in other jurisdictions, which are of "substantial probative value" in ascertaining whether a particular restriction is necessary to some penal interest,[13] tend to show that treating a man like rubbish, under the dehumanizing conditions of solitary which existed here, is not only unnecessary to accomplish the purpose of isolation, but is also futile and self-defeating, and interferes with the primary objective of rehabilitating offenders.[14]

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[12]The imposition of such severe mistreatment for exercising the basic right of self-defense, would seem to be an impermissible penalty for engaging in legally protected activity, cf. Sostre v. McGinn, supra, or at least such grossly excessive punishment in relation to Haines' "offense," as to violate the "precept of justice that punishment for crime should be graduated and proportioned to offense." Weems v. United States, 217 U.S. 349, 367 (1910). See, United States ex rel. Hancock v. Pate, 223 F. Supp. 202, 205 (N.D. Ill. 1963).

[13]Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971).

[14]A survey questionnaire (Appendix "A" to this Brief) has been mailed to each State's Department of Corrections, inquiring as to the use and conditions of solitary confinement in state prisons. The

For example, the New York regulations, which were drafted in the context of litigation,[15] establish minimum standards for segregated confinement and provide for adequate bedding, hygiene, food, recreation, correspondence and visiting.[16] The Missouri regulations, also drafted during the course of litigation,[17] require heat, ventilation, and natural and artificial light in "seclusion" cells, and, further, provide for rules that are the same as in the general population.[18] The State of Maine, in response to a lawsuit,[19] recently amended its statute governing solitary confinement to provide that "adequate sanitary and other conditions required for the health of the inmate shall be maintained," that "a sufficient quantity of wholesome and nutritious food" shall be supplied, that medical examinations be conducted every twenty-four hours[20] and reports filed, and that

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replies received so far indicate that the particular degrading circumstances presented in the case at bar are not at all widespread. The complete results of the survey will be provided to this Court as soon as they are available.

[15]See, Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), on remand, 321 F. Supp. 127 (N.D. N.Y. 1970); Rodriguez v. McGinnis, 307 F. Supp. 627 (N.D. N.Y., 1969); rev'd, _____ F.2d _____ (2d Cir. March 16, 1971); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D. N.Y. 1970), aff'd in part and reversed in part, _____ F.2d _____ (2d Cir. Feb. 24, 1971), Dritsky v. McGinnis, 313 F. Supp. 1247 (N.D. N.Y. 1970); Carothers v. Follette, 314 F. Supp. 1014 (S.D. N.Y. 1970).

[16]New York Department of Correctional Services, Regulations for Special Housing Units, pt. 301 (effective Oct. 19, 1970).

[17]Burns v. Swenson, 288 F. Supp. 4 (W.D. Mo. 1967).

[18]Missouri State Penitentiary Rules and Procedures, Personnel Informational Pamphlet.

[19]Inmates of the Maine State Prison v. Robbins, Civil No. 11-187 (D. Me. filed Aug. 31, 1970).

[20]Some conditions of confinement may so contravene civilized standards that even if their "infliction is surrounded by appropriate safeguards," Talley v. Stephens, 247 F. Supp. 683, 689 (E.D. Ark. 1965), which are absent here, it will not save the practice from con-

if "the recommendations of the prison physician or consulting psychiatrist are not carried out by the warden, a report thereof, with the reasons therefor, shall be forwarded by the warden to the Director of Corrections."[21] The Federal Bureau of Prisons, too, has mandated relatively humane conditions for segregated confinement.[22] See also, AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 414-15 (3d ed. 1966).

The aforementioned developments underscore the stark fact that judicial intervention to protect the paramount federal constitutional rights of prisoners to be treated as human beings, as opposed to animals, has been necessary,

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stitutional infirmity. See Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), where the Arkansas practice of whipping prisoners, as a disciplinary measure, was held to run afoul of the Eighth Amendment, notwithstanding the promulgation of safeguards. In an opinion by Circuit Judge, now Justice, Blackmun, the Court of Appeals stated. "The strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and . . . also violates those standards of good conscience and fundamental fairness enunciated by this court. . . . *Id.*, at 579.

[21]P. L. 1971, Chapter 397 (June 4, 1971), Amending Title 34, § 709, Rev. Stat.

[22]U.S. Bureau of Prisons, Policy Statement 7400.5, app. A, at 2 (Nov. 28, 1966) provides in part:

> "The quarters used for segregation shall be well ventilated, adequately lighted, appropriately heated and maintained in a sanitary condition at all times. . . . All inmates shall be admitted to segregation (after thorough search for contraband) dressed in normal institution clothing and shall be furnished a mattress and bedding. In no circumstances shall an inmate be segregated without clothing except when prescribed by the Chief Medical Officer for medical or psychiatric reasons. . . . [S]egregated inmates shall be fed three times a day on the standard ration and menu of the day for the institution. . . . Segregated inmates shall have the same opportunities to maintain the level of personal hygiene available to all other inmates. . . ."

not only to provide individual redress,[23] but also to get prison officials moving to attain minimum constitutional standards in practices, facilities and services. E.g. *Holt v. Sarver*, 309 F. Supp. 362, 385 (E.D. Ark.), aff'd, _____ F.2d _____(8th Cir., May 5, 1971); *Jones v. Wittneberg*, 323 F. Supp. 93 (N.D. Ohio 1971).[24] It appears that the so-called "hands off" doctrine,[25] under which the courts, including the Seventh Circuit below, granted prison officials a virtual "immunity from judicial scrutiny led to a tradition of lawlessness in the corrections phase of the criminal process."[26] It is, therefore, imperative that the courts cease to ignore valid claims by prisoners of unconstitutional treatment, which threaten their life and what little liberty they possess.

> "Although it might, indeed, be the easier course to dismiss this amended complaint as to these defendants, we cannot flinch from our clear responsibility to protect rights secured by the Federal Constitution."[27]

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[23] In view of the coercive effects of confinement in a punishment cell under unsanitary and degrading conditions, which this Court found in Brooks v. Florida, supra, the granting of affirmative relief from such treatment may operate, not only to enforce the Eighth Amendment, but also to protect a prisoner, who is also a potential accused, against forced self-incrimination. Cf. Screws v. United States, 325 U.S. 91 (1945); United States v. Jones, 207 F.2d 185 (5th Cir. 1953).

[24] In finding the conditions in the Toledo jail to be unconstitutionally cruel, the District Court there said: "The cruelty is a refined sort, much more comparable to the Chinese water torture than to such crudities as breaking on the wheel." 323 F. Supp., at 99.

[25] See, *Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506 (1963).

[26] Turner, *Establishing the Rule of Law in Prisons: A Manual For Prisoners' Rights Litigation*, 23 Stan. L. Rev. 473 (Feb. 1971).

[27] Inmates of the Cook County Jail v. Tierney, No. 68 C 504 (N.D. Ill. Aug. 28, 1968, Hoffman, J.)

As this Court appropriately observed in *McNeese v. Board of Education*, 373 U.S. 668, 675 n. 6 (1963):

> "We yet like to believe that wherever the federal courts sit, human rights under the federal Constitution are always a proper subject for adjudication."

This case should, therefore, be remanded to the District Court[28] for the purpose of developing the record more fully, so that it can be determined whether Haines was actually subjected by prison officials to "excessive" or "unnecessary cruelty", in violation of Eighth Amendment standards.

## II.

## PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF PROCEDURAL DUE PROCESS OF LAW IN THE PRISON DISCIPLINARY PROCEEDINGS.

"'[W]ithin the limits of practicability' . . . a state must afford to all individuals a *meaningful* opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis supplied). In *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970), this Court said:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. . . .'

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[28] In view of the fact that neither the District Court nor the Court of Appeals reached the question of how far along the chain of administrative command liability extends, petitioner has not briefed that issue here. However, on remand, that matter would be appropriate for inquiry. See generally, Monroe v. Pape, 365 U.S. 167, 187 (1961): "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." See also, Joseph v. Rowlen, 402 F.2d 367, 370 (7th Cir. 1968) ("good faith" no defense to arrest without probable cause).

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'"

Many years ago, this Court observed, in an analogous context:

> "Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation.... This does not mean that he may insist upon a trial in any strict sense.... It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper."[29]

The lower federal courts, which have been presented with claims for procedural due process in prison disciplinary proceedings, where substantial deprivations such as solitary confinement or loss of parole eligibility or good time are to be visited upon a prisoner, have adopted a similar approach. See, *Sostre v. McGinnis*, _____ F.2d _____ (2d Cir. Feb. 24, 1971) (facts should be "rationally determined" and prisoner should be "afforded a reasonable opportunity to explain his actions"); *United States ex rel. Campbell v. Pate*, 401 F.2d 55, 57 (7th Cir. 1968) ("the relevant facts... must not be ... capriciously or unreliably determined."); *Nolan*

[29]Escoe v. Zerbst, 295 U.S. 490, 493 (1935). See also, Mempa v. Rhay, 389 U.S. 128 (1967). In an opinion by former Justice Clark, sitting as a Circuit Judge, the Court of Appeals, in Hahn v. Burke, 430 F.2d 100, 104 (7th Cir. 1970), cert. denied, 401 U.S. _____ (Apr. 26, 1971), held that the Due Process Clause guarantees to state probationers a "reasonable opportunity to explain away the accusation." Accord, Goolsby v. Gagnon, 322 F. Supp. 460, 464 (E.D. Wis. 1971), Bransted v. Schmidt, 324 F. Supp. 1232, 1236 (W.D. Wis. 1971), and State ex rel. Johnson v. Cady, 185 N.W.2d 306 (Wis. 1971) (State parolees entitled to the same "reasonable opportunity to explain away the accusation").

*v. Scafati*, 430 F.2d 548 (1st Cir. 1970) ("sufficient safeguards" necessary where punishment "sufficiently great"); *Carothers v. Follette*, 314 F. Supp. 1014 (S.D. N.Y. 1970) ("an opportunity to present evidence before a relatively objective tribunal" is required); *Morris v. Travisono*, 310 F. Supp. 857 (D.R.I. 1970) (consent decree embodying wide range of procedural safeguards).[30]

On its face, it might appear that Haines was afforded an opportunity to explain his actions. A careful examination of the underlying circumstances, however, reveals that the choice was illusory, and that he was effectively precluded from presenting his substantial claim of self-defense.[31]

Where, as here, the disciplinary infraction charged also constitutes a prosecutable offense,[32] an inmate who elects to discuss the matter with prison authorities risks possible self-incrimination.[33] On the other hand, if he elects to stand on his constitutional right to remain silent, and he is unrepresented, then he is precluded from explaining his

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[30] See also, Federal Bureau of Prisons, Policy Statement No. 7400.6 (Dec. 1, 1966); Missouri State Penitentiary Rules and Procedures, Personnel Information Pamphlet pp. 1-7; President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 86 (1967); American Law Institute, Model Penal Code, Article 304.7(2) (Proposed official draft 1962).

[31] Ill. Rev. Stat., ch. 38 §§ 7-1, 7-13; United States ex rel. Hancock v. Pate, 223 F. Supp. 202 (N.D. Ill. 1963).

[32] Ill. Rev. Stat., ch. 38 § 12-1 (assault), § 12-3 (battery).

[33] Ill. Rev. Stat., ch. 108 § 118 provides in pertinent part: "When any crime is committed within any division or part of the penitentiary system by any person confined therein, cognizance thereof shall be taken by any court of the county wherein such division or part is situated having jurisdiction over the particular class of offenses to which such crime belongs. Such court shall try and punish the person charged with such crime in the same manner and subject to the same rules and limitations as charged with crime in such county." A prisoner's fear of potential prosecution for crimes committed in prison cannot be considered speculative. See, e.g., People ex rel. Conn. v. Randolph, 35 Ill. 2d 24, 219 N.E. 2d 337 (1966).

actions. His dilemma is even worse than the normal *Miranda*[34] situation, where the accused loses nothing by remaining silent.

It may be true, as a matter of law, that any statements Haines would have made under those coercive circumstances, and without prior admonitions as to his constitutional rights concerning counsel and self-incrimination, would have been inadmissible in any future criminal proceeding based upon the conduct for which he was being interrogated. See, *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Melson v. Sard*, 402 F.2d 653 (D.C. Cir. 1968) (relying upon *Simmons v. United States*, 390 U.S. 377, 394 (1968)); *Mathis v. United States*, 391 U.S. 1 (1967).[35]

However, absent an assurance that his statements could not be used against him, it cannot be assumed that Haines was aware of any implicit "use immunity"[36] he would enjoy if criminal charges were brought against him. Cf. *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968).

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[34]Miranda v. Arizona, 384 U.S. 436 (1966).

[35]See also, People v. Dorado, 62 Cal. 2d 338, 398 F.2d 361, 42 Cal. Rptr. 169, cert. denied, 381 U.S. 937 (1965); Blyden v. Hogan, 320 F. Supp. 513 (S.D. N.Y. 1970); Clutchette v. Procunier, No. C-70-2497 AJZ (N.D. Cal. June 21, 1971); Opinion of New York Attorney General, 8 Cr. L. Rptr. 2486 (Feb. 11, 1971) (*Miranda* warnings required in prison disciplinary proceedings where misconduct constitutes a crime); United States Bureau of Prisons, Policy Statement 2001.1 (Feb. 19, 1968) (requires warning of rights, including counsel and protection against self-incrimination).

[36]If this Court eventually holds that "transactional immunity", which was never offered to Haines, is constitutionally required, then Haines had even further justification for refusing to waive his privilege against compelled self-incrimination. See generally, Piccirillo v. New York, 400 U.S. 548, 562 (1971) (Brennan J. dissenting); In Re Korman, _____ F.2d _____, 9 Cr. L. Rptr. 2161 (7th Cir. May 20, 1971); In Re Kinoy Testimony, _____ F. Supp. _____, 8 Cr. L. Rptr. 2327 (S.D. N.Y. Jan. 29, 1971); Counselman v. Hitchcock, 142 U.S. 547, 586 (1892).

Haines could have been afforded a realistic opportunity to explain his actions, under a number of alternative methods. The officials could have advised him that any statements made by Haines in the prison disciplinary proceedings would be inadmissible in any subsequent criminal proceeding, thereby removing any legitimate fear of incrimination. Cf. *Melson v. Sard, supra.*[37] Or, Haines could have been afforded representation by another person,[38] who would be able to relate Haines' version of the events in question without the personal risk of incrimination.[39] Or, the officials could have investigated further and obtained favorable information from inmate witness Orlando. Cf., *Washington v. Texas,* 388 U.S. 14 (1967); *Giles v. Maryland,* 386 U.S. 66 (1967).

Barred from any of these alternative protections, Haines was effectively deprived of a meaningful opportunity, guaranteed by due process, to present a valid defense to the disciplinary charge, on the issues of both guilt and severity of punishment. This case should, therefore, be remanded to the District Court for a determination of the extent to which Haines' injuries, from confinement in the degrading punishment isolation cell for fifteen days, resulted from the denial of fundamental procedural safeguards in the prison disciplinary proceedings.[40]

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[37]But see, Note 35, *supra.*

[38]See, Mempa v. Rhay, 389 U.S. 128 (1967) (counsel); United States v. Wade, 388 U.S. 218, 238 n. 27 (1967) (counsel substitute); Johnson v. Avery, 393 U.S. 483 (1969) (inmate legal assistance); Morris v. Travisono, 310 F. Supp. 857, 872 (D.R.I. 1970) (staff member advocate).

[39]Clutchette v. Procunier, *supra;* cf., McGautha v. California, _____ U.S. _____, 39 U.S. L. Week 4529, 4540 n. 20 (May 3, 1971).

[40]Haines also has apparently claimed that his punishment of solitary confinement cell and demotion to "C" grade was based in part upon his refusal to discuss the shovel incident with officials. However, he may not constitutionally be subjected to such a drastic penalty for refusal to waive his constitutional privilege against com-

## CONCLUSION

When the Courts summarily close their doors to valid prisoners' claims of violations of their paramount federal constitutional rights, involving extreme maltreatment and procedural unfairness, a climate is created in which horrendous absues are permitted and encouraged to flourish in the nation's penal institutions, with calamitous results for the rehabilitative process. We do not suggest that the federal courts should be prime movers in the growing prison reform movement. However, where prisoners are subjected to hard core inhuman treatment, and are denied fundamental procedural safeguards, which deprivations are not justified by the necessities of prison discipline and security, and which infringe upon constitutionally protected liberties, then the courts must exercise their remedial jurisdiction, clearly conferred by Congress, to establish a due process minimum level of human dignity and procedural fairness, below which the states may not go.

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pelled self-incrimination. Cf., Spevack v. Klein, 385 U.S. 511 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men's Association v. Commissioner, 392 U.S. 280 (1968). It cannot fairly be said that Haines "waived" his fundamental right to remain silent after acknowledging that he had hit Doherty with the shovel. As this Court observed, in Miranda v. Arizona, 384 U.S. 436, 445 (1966):

> "The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."

Since the defendants did not provide a statement of their reasons for their harsh disciplinary action against Haines, compare, Goldberg v. Kelly, 397 U.S. 254, 271 (1970), it must be assumed for present purposes, until clarified upon remand, that Haines was penalized for an impermissible reason. Cf., Clay (Ali) v. United States, _____ U.S. _____, 39 U.S. L. Week 4873, 4875 (June 28, 1971).

For the foregoing reasons, the judgment below should be reversed, and the case remanded to the District Court for further proceedings.

Respectfully submitted,

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*Attorney for Petitioner*

*Of Counsel:*

Jack Greenberg
James M. Nabrit, III
William B. Turner
Alice Daniel
Max Stern

July, 1971

## APPENDIX A

Gentlemen:

The questions which appear below deal with the use and conditions of solitary confinement in state prisons. This information will be presented to the United States Supreme Court during an appeal scheduled for the Fall of this year. Your answers, when compiled with those of the forty-nine other states will enable the Court to view this important issue from a national perspective. We will appreciate your candid and prompt reply.

Thank you.

Steven Burton

*Questions*

A. State:_____

B. Official Title of Answering Party: _____

_____

1. Solitary confinement is presently used in our State Prisons. Yes ( ) No ( )

2. Solitary cells are, lighted ( ) without light ( )

3. Prisoners in solitary are provided with: (check where appropriate)

| | | | |
|---|---|---|---|
| (a) | bed ( ) | (f) | wash bowl ( ) |
| (b) | mattress ( ) | (g) | towel ( ) |
| (c) | running water ( ) | (h) | other elements of personal hygiene ( ) |
| (d) | soap ( ) | | |
| (e) | toilet ( ) | (i) | clothes ( ) |

Comment:_____

_____

4. Prisoners in solitary receive
   (a) psychiatric visit ( )
   (b) physician visit ( )
   (c) shave and shower—daily ( ); weekly ( ); none ( ); if other, please explain_____

_____

(d) exercise or recreation daily ( ); weekly ( ); none ( ).

(e) regular diet ( ); limited diet ( ); bread and water ( ).

5. Prisoners in solitary are permitted

(a) to communicate with other prisoners
(b) to receive mail
(c) to send mail
(d) to have reading material: Legal ( ) non-legal ( )

6. Maximum time spent in solitary

(a) 1 week ( ); 2 weeks ( ); a month ( ); unlimited ( ).
(b) requirement for release: _____

_____

7. Reasons for prisoner being sent to solitary

1. _____
2. _____
3. _____

Please Return to: Steven Burton
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Great Neck, N.Y. 11023